

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL.)	
S.C. MANAGEMENT, INC. and)	
KENNETH STONE, M.D.,)	
)	
Relators,)	
)	
v.)	Case No. SC84320
)	
THE HONORABLE MARGARET M. NEILL)	
JUDGE OF THE MISSOURI CIRCUIT)	
COURT, TWENTY-SECOND JUDICIAL)	
CIRCUIT,)	
)	
Respondent.)	

Original Proceeding in Prohibition
Reply Brief of Relators

Joseph C. Blanton, Jr. # 32769
Bryan E. Nickell # 42744
BLANTON, RICE, SIDWELL, NICKELL & COZEAN, LLC.
219 South Kingshighway, P.O. Box 805
Sikeston, Missouri 63801
(573) 471-1000
Fax: (573) 471-1012

ATTORNEYS FOR RELATOR S.C. MANAGEMENT, INC.

Ted Osburn # 33224
OSBURN, HINE, KUNTZE & YATES, L.L.C.
1359 North Mt. Auburn Road, Suite D
Cape Girardeau, Missouri 63701
(573) 651-9000
Fax: (573) 651-9090

ATTORNEYS FOR RELATOR STONE

TABLE OF CONTENTS

Table of Cases and Other Authorities	1
Argument	3
Conclusion	10

TABLE OF CASES AND OTHER AUTHORITIES

CASES

<u>Crabtree v. Director of Revenue</u> , 65 S.W.3d 557 (Mo.App.W.D. 2002)	9
<u>LeCave v. Hardy</u> , 73 S.W.3d 637 (Mo.App.E.D. 2002)	5
<u>Maxwell v. City of Hayti</u> , 985 S.W.2d 920 (Mo.App. S.D. 1999)	5
<u>Simul Vision Cable Sys. v. Continental Cablevision of St. Louis County, Inc.</u> , 983 S.W.2d 600 (Mo.App.E.D. 1999)	9
<u>State ex rel. Etter, Inc. v. Neill</u> , 70 S.W.3d 28 (Mo.App.E.D. 2002)	7, 8, 9
<u>State ex rel. Landstar Ranger, Inc. v. Dean</u> , 62 S.W.3d 405 (Mo.banc 2001)	9
<u>State ex rel. Linthicum, Calvin</u> , 57 S.W.3d 855 (Mo.banc 2001)	7, 8
<u>State ex rel. Willman, M.D. v. Marsh</u> , 720 S.W.2d 939 (Mo.banc 1986)	6
<u>Super v. White</u> , 18 S.W.3d 511 (Mo.App.W.D. 2000)	9
<u>V.B.M., D.D.S. v. Mo. Dental Board</u> , 74 S.W.3d 836 (Mo.App.W.D. 2002)	9
<u>Wood v. Wood</u> , 716 S.W.2d 491 (Mo.App.S.D. 1986)	6,7

STATUTES

§508.010 R.S.Mo.	3, 4, 6, 7
§508.040 R.S.Mo.	6, 7

RULES

Rule 44.01	8
Rule 57.01	5
Rule 74.04	5
Rule 74.06	9

ARGUMENT

RELATORS S.C. MANAGEMENT, INC. AND KENNETH STONE, M.D. ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING FURTHER IN THE UNDERLYING CASE OTHER THAN TO TRANSFER SAID CASE FROM THE CITY OF ST. LOUIS TO A PROPER VENUE, BECAUSE VENUE UNDER §508.010 R.S.MO. IS PROPER ONLY WHERE THE CAUSE OF ACTION ACCRUED, WHERE AN INDIVIDUAL LIVES, OR WHERE A CORPORATION KEEPS ITS REGISTERED AGENT, IN THAT IT IS UNDISPUTED AND BEFORE RESPONDENT IN THE UNDERLYING ACTION THAT THE CAUSE OF ACTION ACCRUED IN DUNKLIN COUNTY, RELATOR STONE IS A RESIDENT OF SCOTT COUNTY, AND THE REGISTERED AGENT OF S.C. MANAGEMENT, INC. IS IN ST. LOUIS COUNTY.

Respondent's Brief addresses: 1) when it was first before the Trial Court that Relator Stone has never been a resident of the City of St. Louis; and 2) who had the responsibility to argue that point. Relators are clearly entitled to relief under well-established Missouri law. However, if this Court wishes to entertain Respondent's arguments, the Court should base its ruling on four (4) admittedly undisputed facts:

1. Relator Stone is a resident of Scott County, Missouri and has never lived in the City of St. Louis. Exhibit E, p. 31; Exhibit G, p. 70-71; Exhibit H, p. 75-76; Exhibit O, p. 246; Exhibit Q, p. 351.
2. Relator S.C. Management, Inc. has its registered agent in St. Louis County. Exhibit A, p. 1.
3. Tenet Healthcare Corporation has no registered agent in the State of Missouri and has

insufficient contacts with Missouri to be subject to personal jurisdiction in this state. Exhibit A, p. 1; Exhibit P, p. 350.

4. The cause of action accrued in Dunklin County, Missouri. Exhibit A, p. 1.

Venue is only proper where the cause of action accrued, where a corporation keeps its registered agent, or where an individual resides. See §508.010(3). Thus, in this case venue is only proper in Dunklin County, St. Louis County, or Scott County. No defendant in this case has even a single contact with the City of St. Louis. This Court should make its Preliminary Writ absolute and order Respondent to transfer this lawsuit from the City of St. Louis to a proper venue.

I. Evidence of Relator Stone's Residence Was Properly Before Respondent.

Since the inception of this case, Plaintiff has argued that venue is proper in the City of St. Louis based upon the incorrect allegation that Tenet Healthcare Corporation ("THC") has agents and employees in the City of St. Louis. Exhibit A, p. 2; Exhibit B, p. 6; and Exhibit I, p. 77. THC is now dismissed from this case. Plaintiff never argued or asserted any other basis for venue. Id. Specifically, he never tried to base venue on the residence of Dr. Stone. For the reasons discussed *infra*, Relators were not required to present any evidence of Relator Stone's residence. However, this evidence was in the record before Respondent in any event. Accordingly, venue is not proper in the City of St. Louis.

Respondent argues that there is no evidence in the record establishing the residence of Dr. Stone. This is simply incorrect. Relator Stone's residence was affirmatively stated in an Answer to Plaintiff's Interrogatories attached to Relators' Reply Memorandum. His address is listed as 108 Greenbriar, Sikeston, Missouri 63801. Exhibit O, p. 246. The Interrogatories were signed and sworn under oath. Interrogatory Answers may be used to the extent permitted by the Rules of Evidence; accordingly, these

answers are competent evidence. Rule 57.01(c); see also Rule 74.04 (c)(2); LeCave v. Hardy, 73 S.W.3d 637, 640 (Mo.App.E.D. 2002). That this admittedly true and uncontested information was not in affidavit form as desired by Plaintiff is immaterial.

Respondent notes that Plaintiff's Interrogatory requested the "last known address" of Relator Stone. Respondent therefore argues without any citation to authority that this evidence does not show Relator Stone's address on the date of filing. Respondent's hyper-technical analysis misses the point. The residence of Relator Stone is not and has never been in dispute. He has never resided or worked in St. Louis. If Relator Stone had been a resident of the City of St. Louis, venue would obviously be proper and this venue issue would never have come before this Court. The Interrogatory Answer is a more than sufficient basis to establish Relator Stone's residence. Further, a court may take judicial notice of the geographical location of cities in the state. Maxwell v. City of Hayti, 985 S.W.2d 920, 922 (Mo.App. S.D. 1999).

Plaintiff has never, in any pleading, alleged that venue is proper in St. Louis City based upon the residence of Relator Stone. The entire focus of Plaintiff's contrived and specious contentions on the venue issue was the residence of THC and whether §508.010 or §508.040 R.S.Mo. applied. Plaintiff's current argument requests that this Court ignore the obvious and undisputed fact of Relator Stone's residence in Scott County and all of the arguments made by Plaintiff below to keep venue at an improper place simply because Respondent's own Interrogatory requests the "last known address." This argument is frivolous. Of course, Dr. Stone's residence was further established in the Affidavit filed in accordance with the Motion for Reconsideration. See *infra* at p. 8.

II. Relators Are Not Required to Disprove Unpleaded Venue Theories.

Plaintiff pleaded venue in his initial Petition and in every subsequent Petition. Exhibit A, p. 2; Exhibit B, p. 5-6; Exhibit I, p. 77. Respondent is now asking this Court to fault Relators for relying upon his asserted basis for venue. Respondent's position would require all defendants who object to venue to disprove all possible venue theories, whether pleaded or not. This argument is flawed in logic and law.

Plaintiff followed the proper procedure for pleading venue outlined by this Court in State ex rel. Willman, M.D. v. Marsh, 720 S.W.2d 939, 940 (Mo.banc 1986). Under Marsh, a plaintiff is required to "state a cause of action under" the appropriate venue statute for fixing venue in a particular county. Id. However, Respondent cites in her Brief and in her Order the case of Wood v. Wood, 716 S.W.2d 491, 494 (Mo.App.S.D. 1986) for the proposition that a plaintiff is not required to plead venue. Wood is inapplicable to this case. First, Wood, a Southern District case, was decided prior to this Court's ruling in Marsh. Wood is therefore no longer valid to the extent it conflicts with Marsh. Second, Plaintiff in this case pleaded venue. Respondent is asking this Court to ignore its pleaded basis for venue. As the Eastern District recently held, when "a basis for venue is pleaded, we could hardly fault Relator for adducing evidence in opposition to the pleaded basis." State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28, 32 (Mo.App.E.D. 2002). Respondent is asking this Court to ignore his pleadings in the Circuit Court and the fact that Respondents directly addressed the pleaded basis of venue.

Respondent tries to distinguish the recent Eastern District case of Etter. He argues that Relators "chose the field of battle—Section 508.010," and somehow asserts that this distinguishes Etter. Etter is completely on point here. Plaintiff's initial argument in this case was that venue was proper because THC had agents and employees in the City of St. Louis. Plaintiff made that argument prior to this Court's holding in State ex rel. Linthicum, Calvin, 57 S.W.3d 855 (Mo.banc 2001). Relators addressed Plaintiff's

contentions as pleaded and demonstrated that venue was improper. First, Plaintiffs showed that §508.010 R.S.Mo. applied and that venue was improper even if THC had employees and agents in the City of St. Louis. Exhibit E, p. 26. Further, Relators demonstrated that venue was improper even if §508.040 R.S.Mo. applied because THC was pretensively joined in this case and, in fact, had no agents in the City of St. Louis. Id. Thus, Respondent’s assertion that Relators “chose the field of battle” is simply incorrect. Instead, at all stages in the venue dispute in the Circuit Court, Plaintiff made specious venue arguments all of which Relators directly addressed. Even after Linthicum was decided, Plaintiff continued to argue that venue was proper in the City of St. Louis based on the alleged fact—which was demonstrated to be completely false—that THC had agents and employees in the City of St. Louis. Exhibit M, p. 184. Thus, even after Linthicum, Plaintiff continued to assert venue on the same basis. There is simply no difference between this case and Etter.

III. Respondent Erred in Refusing to Consider Relator’s Motion to Reconsider
and Grant Leave to File the Attached Affidavit.

After Respondent incorrectly ruled on the venue issue, Relators filed a Motion to Reconsider, attaching an Affidavit of Relator Stone stating that he had never lived in the City of St. Louis. Respondent argues that this Court should ignore this Affidavit, as well as the Motion, not based on facts, but based on a hyper-technical reading of the Rules of Civil Procedure. In fact, Respondent does not even attempt to claim that any information in the Affidavit is factually inaccurate. This approach both elevates procedure over substance and misstates the applicable procedure. The Rules of Civil Procedure expressly give the Trial Court power to consider such an Affidavit. Rule 44.01 provides that an affidavit shall be served with a motion “unless the court permits them to be served at some other time.” Moreover, as noted in Etter,

there is no “reason to disallow Relators’ supplementation of the record where Respondent seeks to uphold venue on a basis that was never pleaded.” Etter, 70 S.W.3d at 32.

Despite Respondent’s assertion that motions for rehearing have no basis and do not exist, case law is filled with references to motions to reconsider. See eg. V.B.M., D.D.S. v. Mo. Dental Board, 74 S.W.3d 836, 839 (Mo.App.W.D. 2002); Etter, 70 S.W.3d at 32; Crabtree v. Director of Revenue, 65 S.W.3d 557, 558 (Mo.App.W.D. 2002) (trial court granted motion to reconsider which was subsequently reviewed by appellate court); Super v. White, 18 S.W.3d 511, 514 (Mo.App.W.D. 2000) (motion for rehearing pertaining to summary judgment); Simul Vision Cable Sys. v. Continental Cablevision of St. Louis County, Inc., 983 S.W.2d 600, 604 (Mo.App.E.D. 1999) (appellate court reviewed denial of motion to reconsider the grant of partial summary judgment). This is entirely consistent with the Rules of Civil Procedure, which provide that the Trial Court continues to have jurisdiction over any interlocutory orders and can effectively correct its own mistakes when brought to its attention. See Rule 74.06. Moreover, this Court has, on occasion, ordered a Trial Court to reconsider a decision based on developments in case law. See State ex rel. Landstar Ranger, Inc. v. Dean, 62 S.W.3d 405, 405 (Mo.banc 2001). Respondent’s position herein would require a trial and a subsequent appeal before her factual and legal mistakes can be corrected. This flies in the face of judicial economy and common sense. Accordingly, Respondent erred in failing to consider the Motion for Reconsideration which relied on admittedly undisputed facts.

CONCLUSION

The undisputed facts show that venue is improper in the City of St. Louis. Respondent can point

to no defendant who has any connection with the City of St. Louis. The only nexus to St. Louis is the location of Plaintiff's counsel, which is and should be irrelevant for venue purposes. Accordingly, venue in this case is only proper in the county of Relator Stone's residence (Scott County), the county where the cause of action accrued (Dunklin County), or where Relator SCM keeps its registered agent (St. Louis County). This Court should make its Preliminary Writ absolute and order Respondent to transfer this case to a proper venue.

Respectfully submitted,

BLANTON, RICE, SIDWELL, NICKELL & COZEAN, L.L.C.
219 South Kingshighway, P.O. Box 805
Sikeston, Missouri 63801
(573) 471-1000; Fax: (573) 471-1012

By: _____
Joseph C. Blanton, Jr. # 32769
Bryan E. Nickell # 42744

ATTORNEYS FOR S.C. MANAGEMENT, INC.

OSBURN, HINE, KUNTZE & YATES, L.L.C.
1359 North Mt. Auburn Road, Suite D.
Cape Girardeau, Missouri 63701
(573) 651-9000
Fax: (573) 651-9090

By: _____
Ted R. Osburn #33224

ATTORNEYS FOR DR. KENNETH STONE

Proof of Service

I hereby certify that a copy of the above and foregoing document has been sent via First Class United States Mail, postage prepaid, to Stephen F. Meyerkord, Attorney for Plaintiff, One Metropolitan Square, Ste. 3190, St. Louis, Missouri 63102, phone number (314) 421-0763; and the Honorable Margaret M. Neill, Circuit Court, Div.22, 5th Floor, 10 N. Tucker Blvd., St. Louis, MO 63101, phone number (314) 622-4682, on this ____ day of August, 2002.

Bryan E. Nickell

Rule 84.06 Certification

Pursuant to Rule 84.06(c), the undersigned counsel states that this brief includes the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and contains _____ words.

Bryan E. Nickell # 42744